

ATLIS Wireless LLC
Telesaurus VPC LLC
AMTS Consortium LLC
Telesaurus Holdings LLC
Skybridge Spectrum Foundation
Intelligent Transportation Wireless LLC

www.telesaurus.com

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Advanced Transportation Location & Information Service • ATLIS •

Berkeley CA

Ex parte presentations

February 14, 2008

Marlene Dortch
FCC, Office of Secretary
445 12th Street, SW
Washington, DC 20054

Re: WT 06-49, LMS-M NPRM:

1. Attachment 2 hereto: Reply to Progeny Opposition to Petition for Reconsideration . . . regarding Transfer of Control Application File No. 0003250058 (“Reply,” “Petition,” and “Application”), and related matters.
2. Response to three Ex Parte filings by Squire Sanders law firm,¹ purported made on behalf of “Progeny LMS, LLC,”² dated January 22, 2008, January 29, 2008, and February 4, 2008.
3. Protection of ITS wireless, further ITS-support filings, and resubmitted proposed rule change, Attachment 1 hereto.

The LLCs and Foundation listed above, herein “ATLIS & Associates,” submit this presentation, each part of which is central to this proceeding. This will be filed on ECFS on 2.14.08.

The Application for Transfer of Control,
the Related Petition and Reply, and Related Matters

For reasons of evidence given in the Petition for Reconsideration and Reply identified above, that are clear in FCC and Court records and under applicable FCC rules and FCC and court precedents cited,³ *which evidence and law Progeny LMS LLC did not refute in its Opposition:*

(1) Progeny LMS LLC does not hold any valid LMS licenses (or licensee qualification) and thus has no standing to have commenced or participated in, or to sustain, this proceeding.

¹ ATLIS & Associates note that this Squire Sanders law firm represents ITS America which has submitted a filing in this docket on 5.10.07 that is directly at odds with the position of Progeny LMS LLC, which this law firm now purports to represent (see footnote below: that cannot be ascertained). This raises questions under 47 CFR 1.24 (a)(2) based on DC Bar Association rules 1.7 to 1.10 (conflicts of interest and related matters).

² For reasons given in the Reply and Petition, the persons in control and the ownership of Progeny LMS LLC have never properly disclosed to the FCC on Forms 602 and in the Application, as further discussed below.

³ A copy of the Petition was filed in this docket on 1.16.08, and a copy of the Reply is attached hereto.

This proceeding, that was commenced and sustained by Progeny, should thus be rescinded. At minimum, it should be held in abeyance pending a final decision on the Application and underlying issues raised in the Petition.

Progeny LMC LLC obtained its LMS licenses—*the sole reason that Progeny has caused the FCC to commence and sustain this docket, and in the process cause serious damage to Telesaurus Holdings and Skybridge Spectrum Foundation (as LMS-M licensees) and the LMS ITS radio service development*—without disclosing the fundamental required information and paying the required sums, failure of which clearly disqualified Progeny to obtain and hold the license. Moreover, Progeny LMS LLC unquestionably did not even exist until after well the auction, and under FCC rules and precedents, cited in the Petition, it is impossible for a party that did not win licenses in an auction to be awarded the licenses after the auction as a qualified auction winner, as Progeny’s principal and agents arranged by withholding essential information (e.g., see *Trompex*, DA 01-2480, DA 03-636).

(2) The actual party or parties in control of Progeny LMS LLC since the subject LMS licenses were granted in year 2000, to this time, including in the current form of Progeny LMS LLC (after consent to the Application and resultant change of control) have never been disclosed as required under FCC rules, including on Forms 602, and in the Application.

Thus, no filing by any person or law firm purporting to represent Progeny LMS LLC can be deemed to be the authorized act of Progeny LMS LLC, including all of the filings in this docket, WT 06-49 under the names Progeny LMS LLC, or Progeny. For the same reason, subscription and verification under 47 CFR §1.52 is also not determinable.

Accordingly, at this time, ATLIS and Associates, including LMS-licensees Telesaurus Holdings GB LLC and Skybridge Spectrum Foundation, to protect their LMS-M interests and the public interest in ITS wireless, intend to include the above positions in administrative and judicial appeals and actions if any of the rule-changes sought by Progeny LMS LLC (i.e., persons purporting to lawfully represent that LLC) are granted in this proceeding.

Squire Sanders’ January 22, 2008 Filing,
Purportedly on Behalf of Progeny LMS LLC

This filing took issue with the January 16, 2008 filing of the Petition challenging the Application, and underlying LMS licenses, by ATLIS and Associates (which the Squire filing chose to incorrectly ascribe to Warren Havens) as not relevant to this docket. However, for reasons given above, and in the 1.16.08 filing, and below, the Petition is indeed relevant: it goes to the “foundation” of the docket. See the DC Circuit Court’s *Butterfield* decision excerpt below.

The Application for transfer of control appears to be an attempt to launder the fatal defects in the Progeny licenses (identified in the Petition, and in part noted above) and the related liability of the persons in control of Progeny and who engineering the obtaining and maintaining of the LMS licenses contrary to the most fundamental FCC requirements and protections of fair competition under US antitrust law.

In the Application, new parties (other than Otto Frenzel) including Mr. Raj Singh and his associates, appear as the apparent parties in control of “Progeny LMC LLC,” and Squire Sanders now appears in this docket representing those persons (or whoever actually is in control, which the Application fails to disclose). As the Petition notes, the undersigned put Mr. Singh (and his

associates) on notice of the central matters of the Petition long before the Application and Petition were filed.

In any case, the defects in the licenses cannot be cured or laundered by a transfer of control arranged by the Application or any other means short of proper re-licensing.

This Squire Sanders fling glossed over the critical evidence and legal issues raised in the Petition that are relevant not only to the Application, *but to all of the Progeny LMS LLC's LMS licenses and to this proceeding for reasons noted above*. Indeed, as the attached Reply describes, Progeny did not address the evidence and law, but instead primarily suggested in its Opposition that the FCC decision back in 2000 to grant the licenses to Progeny (not the auction winner Progeny, but a post-auction entity also called Progeny) must remain a settled matter (and made other bald assertions that the Petition and Reply demonstrated as erroneous and evasive).

However, as the attached Reply (errata copy) describes:

Contrary to Progeny-1-2-3, Petitioner may raise in the Petition the new facts they raised, for the reasons given in *Butterfield v. FCC*, where DC Circuit Court held:

....In these circumstances nothing in the language of sections 310(b) and 405 deprived the Commission of power to receive the new evidence and to reconsider or redetermine the case....

Delay in seeking reopening of the record is a factor to be weighed in the exercise of the Commission's discretion. Here, however, it was excusable. The only reason the appellants' effort to reopen was not made earlier in the proceedings was that the new events which occasioned it were kept secret by WJR for several months.⁷ Such a circumstance would have called for reopening the record even under the dissenting opinion in *Enterprise*. That opinion pointed out that 'there was no concealment', because the successful applicant had disclosed the option agreement a few days before the argument of the petition for rehearing. Our dissenting brother added, however, that 'had it withheld the information' until after the (denial of the petition for rehearing) notwithstanding the execution of the agreement (earlier), a very different situation might well be said to have arisen. That is this case.

.... Moreover, appellants should be readmitted to the contest, even if that would serve to prolong it. The new evidence here goes to the foundation of the Commission's decision, so that refusal to reopen the record deprives appellants of their rights as competing applicants....

.... The Commission will conduct further hearings on the question of differences between WJR's original and modified proposals and will reconsider its grant to WJR in the light of the differences thus disclosed.⁴” [*Underlining added. Footnotes deleted.*]

As in *Butterfield*,⁵ in the instant case Progeny-2-3 “kept secret” “the new evidence [that] goes to the foundation of the Commission’s decision” on the subject license

⁴ Footnote in original:

Butterfield v. FCC, 99 U.S. App. D.C. 71; 237 F.2d 552 (1956),

⁵ Footnote in original:

application, including, as the Petition described: that Progeny-2 did not exist until after the auction; that Progeny-2 was not the actual auction bidder and winner; that Progeny-2's controlling interest holder's affiliates and billions of dollars in attributable gross revenues (that resulted in impermissible change in bidder DE size compared to the actual entity that bid using the Progeny name, Progeny-1) were not disclosed; and that Progeny-2 thus submitted multiple blatantly false certifications under oath. Thus, these essential new facts may be brought now as the basis of this Petition, whether under 47 USC §309(d) or §405 (or even if the Petition is deemed a request for rehearing on the original application). The court in Butterfield properly noted the Commission's authority (cited above and elsewhere in the decision) to rehear a licensing matter and change its decision based on new evidence. It has this authority under and should exercise it regardless of how the evidence came to it, as provided in 47 USC § 312(a)(1) and (2).

Other excerpts from the Petition (its attached evidence) follow below, to commence to illustrate the clear evidence of major rule violations resulting in invalidity of the subject LMS licenses that Squire Sanders and others attempting to defend Progeny LMS LLC or launder the defective licenses cannot and do not even attempt to address in the Opposition or the 1.22.08 letter in this docket:

(1) From the State of Indiana, Secretary of State (Petition, p. 26):

. . . I hereby issues to such limited liability company [Progeny LMS LLC, listed at the top of document] this Certificate of Organization, and further certify that its existence will begin April 16, 1999. [Signed by the Deputy Secretary of State.]

The LMS Auction took place from February 23, 1999 to March 5, 1999 (see the FCC auction-21 web page).

(2) From the Amended Complaint of Otto N. Frenzel v. Curtis Johnson et. Al (Johnson was the actual party in control of the "Progeny" bidder and it its Form 175), under oath by Mr. Frenzel (starting at Petition p. 32): This was a verified Complaint, signed under penalty of perjury by Otto N. Frenzel (Petition, p. 62). The paragraphs numbers below are the numbers of paragraphs in the Complaint. Items in brackets in the below are added. (Many other parts of this Complaint and other documents in this court case, compared to the FCC records on Progeny LMC LLC (and the actual bidder, another "Progeny" entity), provide other relevant evidence.)

18.... In about January 1999, Johnson prepared and submitted to the FCC a Form 175...in the name of "Progeny LMS, LLC"...[that] contained false and misleading statements about the applicant. For example, the Form stated that "Progeny LMS,

Also see: (i) *Re Beacon Broadcasting Corporation*, FCC FCC96-66 (adopted 2/21/96): reconsideration is appropriate where petitioner shows either material error or omission in original order, or raises additional facts not known or not existing until after petitioner's last opportunity to present such matters, and (ii) *Re Armond J. Rolle* (1971) 31 FCC2d 533: proceedings will be remanded and reopened by newly discovered evidence relied on by petitioner that could not with due diligence have been known at time of hearing, and if proven true, is substantially likely to affect outcome of proceeding. These also apply in to the instant case.

LLC” had been formed in 1996...when in fact the company had not been formed at all.

25. During the meeting on about March 17, 1999 [after the auction], Barnard reviewed the proposed structure of “Progeny LMS, LLC”.... Frenzel left the meeting without...agreeing to any structure for “Progeny LMS, LLC” that gave Frenzel less than full control.

26-28. On about March 18, 1999, Frenzel met with Johnson....a telephone conference was conducted with one or more Washington, D.C. attorneys....During the conference....discussed possible methods for ensuring that “Progeny LMS, LLC” would qualify for a 35% “very small business” discount of the licenses’ purchase price. [The auction was over on March 5, 1999.] Frenzel asked one or two questions....A number of possible methods were discussed, including “classifying part or all of Frenzel’s \$1,879,155 contribution to ‘Progeny LMS, LLC’ as debt....[but still asserting

31....On Monday, March 22, 1999 McMains [previously described as Frenzel’s attorney]...reiterated...Frenzel’s refusal to consent to anything but 100% ownership—that the owner of the licenses (whatever its name) was to be controlled by Frenzel. [The parenthetical is in the original.]

32-34....on March 22, 1999....soon after these events, Frenzel confirmed...that neither ”Progeny LMS LLC” nor ... had ever been formed or existed in Indiana, whether in their own names or as registered “d/b/a” designations of other companies. In an attempt to cure the serious problems caused by these misstatements in the Form 601, and also to protect his \$1,879.155 investment against possible forfeiture and penalties, Frenzel promptly authorized the organization of LMS [Progeny LMS, LLC] with an effective date of February 18, 1999—at least four days before the auction began.

[The Petition comments on the preceding that it is false: the effective date is the date stated above: by the Indiana Secretary of State. Post dating of a certificate and self-serving pronouncements of an earlier effective date are not legally valid.]

99-101. Frenzel and Johnson...were mutually mistaken about the true identity of the applicant for the licenses....Frenzel...payment of his \$1,879,155....Frenzel...is entitled to a full rescission and repayment of the money [paid to the FCC toward the licenses: see above]

[Earlier from the Complaint contained in the Petition, regarding undisclosed affiliates of Otto Frenzel:]

3. Frenzel ...currently is a director and chairman of the executive committee of that bank’s successor, National City Bank, Indiana. Frenzel also sits on the boards of IPALCO Enterprises, Indiana Energy, Inc. and American United Life Insurance Company....

In the Petition, Exhibit 1, commencing at page 15, proof is provided from SEC filings of the above-noted company affiliates of Nick Frenzel of these affiliates’ annual gross revenues, in the three years preceding the year of the subject auction, that had to be attributed to Progeny LMS LLC-- *in the billions of dollars in total*-- but were never disclosed by Mr. Frenzel or anyone associated with

Progeny. Clearly, they knew of these requirements as sophisticated businessmen and legal counsel, and as they reveal in this Complaint in the ¶¶ 26-28 quotation above: how to “ensure” that the post-auction-formed Progeny LMS LLC would end up getting the 35% discount that another bidder who won the licenses used in the auction, and how to “classify” Mr. Frenzel’s “contribution” as “debt” but still where Mr. Frenzel ended up with “full control” and “100% ownership” in “whatever its name” – whatever entity by whatever name Frenzel could structure after the auction to get the licenses. On this: again, see the *Trompex* decisions cited above, and other applicable law in the Petition and Reply.

Squire Sanders’ January 29, 2008, and February 4, 2008 Filings,
Purportedly on Behalf of Progeny LMS LLC⁶

These filings reveal, again (as with all past filings in the name of Progeny), that Progeny LMS LLC (whoever are the actual controllers and owners) entirely ignore the ***Intelligent Transportation System*** (ITS) purpose of the LMS-M spectrum that could not be *more critical to US transportation, public safety, and environment*, as explained in detail in the ATLIS and Associates’ filings in this docket. There is simply no justification whatsoever for diverting any LMS-M spectrum to some other “flexible” purpose.

Mr. Nick Frenzel and associates, as reflected in the evidence cited in part above, and Mr. Raj Singh and associates listed in the Application, as is well known, are wealthy. They each seek to expand their wealth by converting important segments of the nation’s radio spectrum from essential high-public-interest purposes, which the FCC should protect, to yet another “flexible” band which they apparently believe will be an easier path to more profits, and to do this, they also bother for years many companies and industries using the spectrum on a Part 15 basis, and ignoring entirely the Federal agencies’ priority rights (no coordination attempted by Progeny with NTIA).⁷ LMS-M sold for the modest prices bid at auction in part since, as the FCC wrote extensively in the LMS Orders leading to the auctions, ITS was a new field and ITS wireless would take considerable development and time and expense to success. The Progeny-related persons never attempted this to any degree, as their filings reveal in this docket 06-49, in RM-10403, and in the license-deadline extension request by Progeny.

⁶ These filings, as with all past Progeny LMS LLC ex parte filings in this docket concerning presentations that consisted of or contained oral presentations, clearly fail to meet the requirement for oral ex parte presentation disclosures, and on that basis alone, are objected to by ATLIS and Associates in this docket, and if needed, in administrative and judicial appeals. The essential breached requirement is in 47 CFR §1.2106 (b) (2) Oral presentations: “....Memoranda must contain a summary of the substance of the ex parte presentation and not merely a listing of the subjects discussed.” Requirements for required summaries are further set out in 47 CFR §1.49: Specifications as to pleadings and documents: “....(c).... a summary of the filing, suitably paragraphed, which should be a succinct, but accurate and clear condensation *of the substance* of the filing. It should not be a mere repetition of the headings under which the filing is arranged.” (Italics added.) Since the Progeny presentations did not contain such substantial summaries, they are impermissible ex parte presentations to be disregarded in decision in this proceeding, and on any appeal thereof, and that also should be reported to the General Counsel.

⁷ This lack of coordination could render any changes moot. NITA retains priority rights to the LMS band. ATLIS and Associates have met with NTIA and many of their federal agency spectrum clients for years about their common interests in advancing ITS wireless in the nation, including with the entire LMS band, 902-928 MHz, with care to accommodate Part 15 and amateur radio uses.

Protection of ITS Wireless, Further ITS-Support Filings,
and Resubmitted Proposed Rule Change

The LMS-M rules and purposes should be maintained and protected. The rules *already afford wide flexibility* for the much needed ITS purposes in the large and expanding ITS markets.

All LMS licenses may be afforded ample additional flexibility by simple rule changes as the undersigned previously proposed, to which no party in this proceeding objected. This proposal is again attached hereto, as Attachment 1.

If, with such ample flexibility, any LMS-M licensee can later--after demonstrated major attempt at ITS wireless, including the required multilateration location service and the permitted associated communication services—show a need for further “flexibility” or other rule changes, such licensee can seek an appropriate waiver for its own demonstrated case.

Also, the undersigned has met and communicated with various Federal agencies and Congressional offices on matters of this NPRM, including in recent months DOT, NITA, DHS, both California Senators, several California Representatives, offices of other Congress persons involved in ITS and FCC oversight, as has further meetings and presentations planned. All these entities and persons expressed clear understanding of the need and value of ITS in the nation and enabling ITS wireless. In the near future, the undersigned will arrange for written submissions and/or in-person presentations in this docket of relevant information from said agencies and offices.

Respectfully,

/s/

Warren Havens
President,
ATLIS Wireless LLC,⁸
Telesaurus Holdings GB LLC
Skybridge Spectrum Foundation
and their affiliates listed above

2649 Benvenue Ave., #2-6
Berkeley, CA 94704
(510) 841 2220

⁸ ATLIS Wireless LLC was formed in 2007 to provide operational services to the other entities listed above including Telesaurus Holdings GB LLC that holds LMS licenses nearly nationwide, and also assists Skybridge Spectrum Foundation that also holds LMS licensees nearly nationwide.

Attachment 1

(Same as initially filed with the Telesaurus report of Ex Parte meeting of 8.10.07.)

Proposed rule change. Section 90.353 (g):

Existing:

(g) Multilateration LMS systems whose primary operations involve the provision of vehicle location services, may provide non-vehicular location services.

Proposed change (underlining added; footnotes proposed as part of rule):

(g) Multilateration LMS systems whose primary operations involve the provision of vehicle location (or location and communication) services, may provide non-vehicular ~~location~~ services on an ancillary basis as follows:

(1) ITS-Exclusive Ancillary Service. If the ancillary service is exclusively in support of Intelligent Transportation Systems or transportation infrastructure, then the licensee must submit on ULS a certification and showing, using Form 601, under the license or licenses involved. The application must describe all existing and planned primary services and the proposed ancillary service. The application must demonstrate that the proposed ancillary service will be exclusively in support of Intelligent Transportation Systems or transportation infrastructure. Said ancillary service may be provided prior to, as well as after, construction and commencement of operation of the primary service.

(2) Other Ancillary Service.

(A) General. If a licensee seeks to provide ancillary service other than for “ITS-Exclusive Ancillary Service” under subsection (g)(1) immediately above, then the licensee must submit on ULS an application, using Form 601, seeking amendment of the subject license or licenses. The application will be placed on public notice and subject to petitions to deny under 47 USC §309 (d). The application must describe all existing and planned primary services and the proposed ancillary service. The application must demonstrate that the proposed ancillary service will either substantially augment, or at minimum will not substantially diminish, the primary services by the time of and at all times after the second, ten-year construction deadline (and any extensions thereto) of the license(s) involved. Said ancillary service may be provided prior to, as well as after, construction and commencement of operation of the primary service.

(B) Flexible Ancillary Service. If the proposed ancillary service will not substantially augment the primary services, then either: (i) the application must further demonstrate that the proposed ancillary service will pose no more interference to existing systems of Part 15 devices than the proposed primary services in the same area, under the standards explained by the Commission in paragraph 69 of FCC 97-

305,⁹ or (ii) in lieu of the preceding demonstration regarding Part 15 devices, the applicant may, in the application, elect the following “safe harbor” technical limitations for the proposed ancillary service which shall be deemed to satisfy the purposes of said demonstration: [describe: see filing text above: [Telesaurus has no recommendation at this time, mostly since it does not seek the sort of flexible ancillary service under this paragraph. Telesaurus notes that the NPRM suggested technical limitations, as did at various points Progeny and the Part 15 Coalition.]

(3) Classes of Ancillary Services. The proposed ancillary services under subsections (g)(1) or (g)(2) above may include the following classes of service: common carrier or non common carrier services; private or commercial mobile radio services; land, maritime, or aeronautical services; as well as fixed wireless services. The application must provide a sufficient description of each the proposed ancillary service to demonstrate each such classification.

⁹ In the Matter of Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, *Memorandum Opinion and Order*, released September 16, 1997.

**Before the Federal Communications Commission
Washington, D.C. 20554**

In the Matter Of	
Progeny LMS LLC Transfer of Control Application from Progeny LMS LLC to Progeny LMS Holdings LLC	File No. 0003250058
Required Notification of Transfer of Control	File No. 0003274382

To: Office of the Secretary. Attn: Chief, Wireless Telecommunications Bureau

Reply to Opposition to Petition for Reconsideration
And in the Alternative, Petition to Deny or Request under Section 1.41
Errata copy [*]^{*}

The undersigned (“Petitioners”) hereby Reply to the Opposition of Progeny LMS LLC to the above captioned Petition (“Opposition” and “Petition” also called “Recon”).¹

Petitioners Have Standing under 47 USC §§ 309(d) and 405
as Persons Whose Interests Are Aversely Affected, and
Facts Asserted Could Not Have Been Earlier Presented Due to Progeny’s Withholding

Contrary to Progeny-2-3, Petitioners have standing. First, as described by the DC Circuit Court in *High Plains v. FCC*:

We have held that “[a] bidder in a government auction has a 'right to a legally valid procurement process'; a party allegedly deprived of this right asserts a cognizable injury.” 232 F.3d at 232 (quoting *DirecTV, Inc. v. FCC*, 324 U.S. App. D.C. 72, 110 F.3d 816, 829 (D.C. Cir. 1997)). A disappointed bidder need not show that it would be successful if the license were auctioned anew, but only that it was able and ready to bid and that the decision of the Commission prevented it

^{*} [*] The original copy filed on ULS was in MS Word and the ULS conversion to PDF changed formatting, including moving footnotes to the end. This copy is in PDF to fix those changes, and also makes other corrections, and justify margins. Corrections are in strikeout and red.

¹ Herein, by “Progeny-1” we mean the entity using “Progeny” in its name that bid in the first LMS auction that resulted in the subject LMS licenses, by “Progeny-2” we mean the entity with “Progeny” in its name that has held the licenses since the auction, by “Progeny-3” we mean the entity with “Progeny” name that has the undisclosed new controlling interest pursuant to the subject application the Petition contests, and by “Progeny-2-3” we mean Progeny-2 and/or Progeny-3 (for reasons noted herein, it is not clear who presented the Opposition and who is the real party in interest in each). Other capitalized terms herein were defined in the Recon or Petition.

from doing so on an equal basis. *See id.* The bidder may satisfy the requirement of redressability by showing that "'it is ready, willing, and able' to participate in a new auction should it prevail" in court. *Id.* (quoting *Orange Park Fla. T.V., Inc. v. FCC*, 258 U.S. App. D.C. 322, 811 F.2d 664, 672 (D.C. Cir. 1987)).²

Petitioner Havens was “able and ready to bid” since he *actually* bid against Progeny-1 for most of the larger C-block licenses (and some others) that ~~New~~ Progeny-2 eventually obtained. In addition, Petitioners intend to, and are ready and able to, accept the relief requested in the Petition with regard to the subject LMS Licenses.³

Petitioners also have standing and interest since their current license holdings⁴ may provide competitive services to the subject LMS Licenses held by Progeny-2-3.⁵ As competitors, Petitioners were damaged and prejudiced by Progeny’s actions complained of in the Petition, since they involve major violations of FCC bidding and disclosure rules required for fair competition, **and** equal treatment.

Contrary to Progeny-1-2-3, Petitioner may raise in the Petition the new facts they raised, for the reasons given in *Butterfield v. FCC*, where DC Circuit Court held:

² *High Plains v. FCC*, 349 U.S. App. D.C. 256 (2002).

³ This may be with waiver of the LMS-M 8-MHz cap in some cases, and in others with no waiver since (i) Telesaurus Holdings GB LCC holds only 4 MHz of the LMS-M A block licenses originally issued to Havens, and can thus obtain the 2.25 MHz B block within this cap, and (ii) Spectrum Skybridge Spectrum Foundation, of which Havens is the controlling party (but with no legal economic interest since this Foundation is a nonprofit corporation barred from providing such private interests), which holds the rest, 2 MHz, of these original A block licenses, can obtain 5.75-MHz C-block licenses and still be within the spectrum cap. Telesaurus Holdings and this Foundation are successors in interest to Havens in said original A block licenses that Havens won in Auction 21, in competition with Progeny-1 that involved bidding on a large percentage of the licenses ultimately issued to Progeny-2.

⁴ THL holds LMS licenses, ACL holds AMTS licenses, ITL holds MAS and AMTS licenses, TVL holds AMTS licenses, and Havens holds 220-222 MHz licenses, all of which may provide competitive services to those of LMS, including location (either multilateration or by other techniques) and monitoring, dispatch communications, etc. In fact, Petitioners’ nationwide plans involve using THL’s LMS licenses along with its affiliates’ licenses for nationwide ITS. All of these licenses can provide PMRS.

⁵ The Commission has found this to be sufficient for standing previously. See for example, *Order*, DA 03-2065, released June 25, 2003, 18 FCC Rcd 12309.

....In these circumstances nothing in the language of sections 310(b) and 405 deprived the Commission of power to receive the new evidence and to reconsider or redecide the case....

Delay in seeking reopening of the record is a factor to be weighed in the exercise of the Commission's discretion. Here, however, it was excusable. The only reason the appellants' effort to reopen was not made earlier in the proceedings was that the new events which occasioned it were kept secret by WJR for several months.⁷ Such a circumstance would have called for reopening the record even under the dissenting opinion in Enterprise. That opinion pointed out that 'there was no concealment', because the successful applicant had disclosed the option agreement a few days before the argument of the petition for rehearing. Our dissenting brother added, however, that 'had it withheld the information until after the (denial of the petition for rehearing) notwithstanding the execution of the agreement (earlier), a very different situation might well be said to have arisen. That is this case.

.... Moreover, appellants should be readmitted to the contest, even if that would serve to prolong it. The new evidence here goes to the foundation of the Commission's decision, so that refusal to reopen the record deprives appellants of their rights as competing applicants....

.... The Commission will conduct further hearings on the question of differences between WJR's original and modified proposals and will reconsider its grant to WJR in the light of the differences thus disclosed.⁶ [*Underlining added. Footnotes deleted.*]

As in Butterfield,⁷ in the instant case Progeny-2-3 “kept secret” “the new evidence [that] goes to the foundation of the Commission’s decision” on the subject license application, including, as the Petition described: that Progeny-2 did not exist until after the auction; that Progeny-2 was not the actual auction bidder and winner; that Progeny-2’s controlling interest holder’s affiliates and billions of dollars in attributable gross revenues (that resulted in impermissible change in bidder DE size compared to the actual entity that bid using the Progeny name, Progeny-1) were not disclosed; and that Progeny-2 thus submitted multiple blatantly false certifications under oath. Thus, these essential new facts may be brought now as the basis of this Petition, whether under

⁶ *Butterfield v. FCC*, 99 U.S. App. D.C. 71; 237 F.2d 552 (1956),

⁷ Also see: (i) *Re Beacon Broadcasting Corporation*, FCC FCC96-66 (adopted 2/21/96): reconsideration is appropriate where petitioner shows either material error or omission in original order, or raises additional facts not known or not existing until after petitioner's last opportunity to present such matters, and (ii) *Re Armond J. Rolle* (1971) 31 FCC2d 533: proceedings will be remanded and reopened by newly discovered evidence relied on by petitioner that could not with due diligence have been known at time of hearing, and if proven true, is substantially likely to affect outcome of proceeding. These also apply in to the instant case.

47 USC §309(d) or §405 (or even if the Petition is deemed a request for rehearing on the original application). The court in Butterfield properly noted the Commission's authority (cited above and elsewhere in the decision) to rehear a licensing matter and change its decision based on new evidence. It has this authority under and should exercise it regardless of how the evidence came to it, as provided in 47 USC § 312(a)(1) and (2).

Progeny-2-3 Fails to Address the Substance of the Petition

Progeny-2-3 relies on a procedural argument that it is too late to bring up arguments regarding Auction No. 21 (replied to above) however, the Opposition does not contest the factual assertions summarized again above, regarding Progeny-1 and Progeny-2 conduct in Auction 21. Contrary to suggestions in the Opposition, Progeny-2 never disclosed this information to the Commission.⁸ These new facts result in disqualification under the relevant auction (and other) rules, including automatic disqualification under the rules for Forms 175 (changes in control, including actual bidder entity, and in DE size after the Form 175 deadline results in automatic disqualification [unless a waiver is sought and granted, which Progeny-2 did not seek and get]). As shown in the Recon, prevailing Court precedents require disqualification (see e.g. Recon at Sections 3, 5, 6 and 7 and Exhibit 3). For example, the DC Circuit found in *McKay*⁹ that

⁸ In addition, if these had been disclosed, Progeny-2 would have had to have asked for a waiver and the Commission would have had to put that on Public Notice and have granted it. Yet, this is not in the record either.

⁹ *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955) (“*McKay*”), This same court, in a recent 2003 case involving FCC auctions and bidding credits (but not DE bidding credits under strict rules), *Biltmore v. FCC*, 321 F. 3d 155, cited this *McKay* decision as well as its *Superior Oil* (*Superior Oil Co. v. Udall*, 409 F.2d 1115 (D.C. Cir. 1969) (“*Superior Oil*”)) decision cited below as still-good law (emphasis added):

The Commission is, of course, correct in pointing out that the [true and correct] family certification is not among those required pursuant to §1.2105, the omission of which incurably disqualifies the applicant as specified in § 1.2105(b)(1). . . . In . . . [*McKay* and *Superior Oil*] we reversed the Secretary of the Interior's award of a lease based upon an incurably defective application. . . . In this case . . . [b]ecause the family [true and correct] certification was not required by §1.2105, the omission could be cured.

violations of Section 1.2105 are incurable. See also *Superior Oil* cited in the Petition. The Opposition did not address the precedents given at Exhibit 3 of the Recon. Therefore, it is conceding these facts and arguments, and the Petition should be granted.

**The Petition is Accurate and Contains Basis to
Withdraw the Commission's Consent to Progeny's Transfer
And Other Matters**

The Opposition is incorrect that the Recon is inaccurate in its arguments that Holdings did not exist at time of the Application. The Opposition argues that the Recon “asserts that the Transferee “is described as a proposed entity...” (Opposition at page 3). The Recon simply pointed out exactly what the Application itself said—“The Applicant proposes to create a holding company called Progeny LMS Holdings, LLC (“Transferee”)....” Petitioners and the public in general have to rely on what was filed in the Application. They cannot presume an entity actually exists when the Application states otherwise. Thus, the Recon was accurate and the Application on its face was defective and must be dismissed. Even if the documents in the Opposition’s Exhibit are legitimate (see below as to why they ~~should~~ ~~may~~ not be acceptable due to failure to include an affidavit), it is too late to provide them now. In any case, Progeny-2-3 could have stated that Holdings existed in the Application at the time it was filed, but since it stated otherwise it is now too late to correct the Application. Thus, it must be dismissed as defective.

Contrary to the Opposition, Progeny-2-3 and Holdings have not fully disclosed their ownership on the FCC’s Form 602 as required. As of today, per ULS records, Progeny-2-3 and Holdings have not filed updated or new Form 602s with the FCC. The only Form 602 currently on file (for any Progeny entity) with the FCC lists solely Otto N. Frenzel : as 100% owner. Sections 1.9119 and 1.2112 required that Progeny2-3 and Holdings file Form 602s with the

Since cited in *Biltmore*, *McKay* and *Superior Oil* have not been cited in any other US court decision. The fundamental holdings in *McKay* and *Superior Oil* are controlling precedent on matters for which they are cited herein.

Application. This was not done. Therefore, the Application is defective for this reason too as stated in the Recon. The Form 602 is a separate form that must be filed apart from the Application. Thus, the Opposition is incorrect that the ownership and control has been fully disclosed since the Forms 602 for these two entities have yet to be filed.

Also, contrary to the Opposition, the Application did not clearly identify as required ownership and control. The attachment to the Application stated, “The Applicant is currently 50.18% owned and controlled by Otto N. Frenzel (*see* Exhibit A) and holds 228 Location and Monitoring Service, Multilateration licenses.” From this it is not clear whether or not Progeny-2-3 is stating that 50.18% of the interest in Progeny-2-3 is owned and controlled by Mr. Frenzel or if Mr. Frenzel holds 50.18% and also has *de facto* and *de jure* control of the pre-transfer Progeny-2. Holding 50.18% interest does not necessarily mean that a person actually controls an entity. The Application simply does not make this clarification and it **also** cannot be assumed, that when Mr. Frenzel dropped below 100% he retained such control of Progeny-2.

An Opposition to a challenging petition cannot be used to amend or cure any license application.

Furthermore, the Opposition fails to refute the Recon’s arguments (see e.g. Recon at page 3) that the Application failed to properly disclose the real party in interest in the Application as required by the Commission’s Rules. The Opposition admits that no one entity has *de jure* and *de facto* control of Holdings and thus Progeny-3 (see Opposition at page 4), but then fails to disclose what group of entities or persons do exert control. The Commission’s Rules still require that the real party or parties in interest, those who ultimately control the licensee, be disclosed. In part, this is needed for the Commission to determine whether or not the controlling person or group of persons is qualified. Although it pertains to designated entity bidding credits, Section 1.2110(b)(3)(ii) clearly shows that the FCC requires disclosure of all interest holders where there is not an identifiable controlling interest. The Application lists Holdings as the “real party in

interest”; however, Holdings cannot be the real party in interest in itself or in Progeny-3. From the Form 603 instructions this has to be a person(s). Holdings is the “applicant”; therefore, it must list its real party(ies) in interest. The Form 603 instructions state [underlining added for emphasis] (see Form 603 instruction, July 2007, at page 10):

The Assignee or Transferee must identify the real party (parties) in interest. If the Assignee or Transferee is also the real party in interest, enter the Assignee’s or Transferee’s name in this item. If a party other than the Assignee or Transferee is the real party in interest (*e.g.*, a parent or other controlling entity), enter that party’s name in this item. If there is more than one real party in interest, attach an exhibit detailing all parties in interest.

The real party in interest is defined as a person who “has an ownership interest, or will be in a position to actually or potentially control the operation of the station.” *Astroline Communications Co. Ltd. v. FCC*, 857 F.2d 1556, 1564 (D.C. Cir. 1988); *see also* *In Re Applications of Georgia Public Telecommunications Commission, et al.*, MM Docket No. 89-337, 7 FCC Rcd 7996 (1992); *In Re Applications of Madalina Broadcasting, et al.*, MM Docket No. 91-100, 8 FCC Rcd 6344 (1993).

Rule Section 1.2112 states [underlining added for emphasis]:

(a) Each application to participate in competitive bidding (*i.e.*, short-form application (*see* 47 CFR 1.2105)), or for a license, authorization, assignment, or transfer of control shall fully disclose the following:

(1) List the real party or parties in interest in the applicant or application, including a complete disclosure of the identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant;

From the above, it is clear that the Opposition erred in stating that the Application properly disclosed ownership and control when it did not. Thus, the Application is defective for this reason and must be dismissed.

Further, The Recon at Exhibit 3 gave Court precedents that show Progeny-2 would have had to have obtained several rule waivers to obtain its licenses including but not limited to waiver of the requirements of Sections 1.2105 and 1.2110 (*e.g.* Progeny-2 did not exist at time of

Form 175 or auction, the Progeny-2 Form 601 was an impermissible transfer of control (even if Progeny-2 had existed at the time of the Progeny-1 Form 175, and the auction), and the granted Form 601 of Progeny-2 failed to disclose affiliates of Otto Frenzel that would have disqualified it from bidding credits). However, as shown by the Court precedents the defects shown in the Progeny-2-related court filings (see Recon) were incurable, and contrary to the Opposition's suggestions the Bureau staff had no authority to waive them, and as noted above, there is no indication that the Bureau did waive any rules. The Opposition is also in error that these matters are no longer relevant and already decided. The passage of time is not a cure for Progeny's hidden fraud and misrepresentations. Violations of Commission Rules are always relevant whether or not, and when they are discovered.

The Commission "warning" Progeny references has been appealed by Petitioners and has no relevance here. The Opposition's reference to this is solely meant to divert attention from the substance of the Recon and Progeny's own rule violations.

No Affidavit

The Petition is based on factual assertions under oath and the Opposition's assertions of facts also required an affidavit but failed to have one. The Recon made factual assertions. As Petitioners argued, the Recon, should be considered a petition to deny. In a petition to deny proceedings, factual assertions must be supported by an affidavit—see §1.939(f). The Opposition presented new factual evidence for the first time in its Exhibit. However, such information should have been provided in the Application if it were not too late to amend it now. Since it was not, the Application is incurably defective as argued above. The Opposition's Exhibit is clearly the type of factual allegation that must be supported by an affidavit sworn to by a person with personal knowledge thereof. There is no way to know if the Exhibit is true and correct without someone from Progeny-2-3 stating so. Thus, the Opposition is defective for this

reason and should be dismissed. Progeny-2-3 also does not state which Progeny, the pre transfer of control or post transfer of control, filed the Opposition. They are different entities.

Counsel to Progeny Opposed Progeny in LMS NPRM

Petitioners note here that Progeny-2-3's law firm counsel for the Opposition has also filed on behalf of another client, ITS America, a filing against the Progeny-2 position in that NPRM. Petitioners question whether legal counsel can represent two clients with opposing positions.

Progeny Position in NPRM Not Stated

Petitioners point out here that the proposed post-transfer Progeny-3 has not yet declared its position in the LMS NPRM and whether or not it supports the pre-transfer Progeny-2 position.

Conclusion

For the reasons given, the Commission should grant the relief requested including, but not limited to, consent rescission and dismissal of the Application and initiation of a proper hearing.

Respectfully submitted,

[Submitted Electronically. Signature on File]

Warren C. Havens, Individually and as President of
Intelligent Transportation & Monitoring Wireless LLC
AMTS Consortium LLC
Telesaurus VPC LLC
Telesaurus Holdings GB LLC
2649 Benvenue Ave., Suites 2 and 3
Berkeley, CA 94704
Ph: 510-841-2220
Fx: 510-841-2226

February 5, 2008

Declaration

I, Warren C. Havens, hereby declare, under penalty of perjury, that the foregoing Reply was prepared pursuant to my direction and control and that all the factual statements and representations contained herein are true and correct.

[Submitted Electronically. Signature on File.]

Warren C. Havens

Date: February 5, 2008

Certificate of Service

I, Warren Havens, hereby certify that I have, on this 5th day of February 2008, caused to be served by placing into the USPS mail system with first-class postage affixed, unless otherwise noted, a copy of the foregoing Reply to the following: ¹⁰

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
(Filed via ULS)

Progeny LMS, LLC
ATTN Carson Agnew
2058 Crossing Gate Way
Vienna, VA 22181
(And a Courtesy Copy, not for purpose of service, via email to:
cagnew@progenylms.com)

Squire, Sanders & Dempsey L.L.P.
ATTN Bruce Olcott
1201 Pennsylvania Avenue, NW, 5th Floor
Washington, DC 20004
(And a Courtesy Copy, not for purpose of service, via email to: bolcott@ssd.com)

[Filed Electronically. Signature on File.]

Warren Havens

This errata copy served as note above on 2.13.08.

[Filed Electronically. Signature on File.]

Warren Havens

¹⁰ The mailed copy being placed into a USPS drop-box today may not be processed by the USPS until the next business day.